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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

KENNETH H. KATSCHKE and PAUL E. PICKLE,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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To the Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioners, Kenneth H. Katschke and Paul E. Pickle, pray that a writ of certiorari be issued to review the decision of the United States Court of Appeals for the Seventh Circuit in the above case.

JUDGMENT AND OPINION OF THE COURTS BELOW

The judgment of the United States District Court for the Northern District of Illinois, Eastern Division, was imposed on June 30, 1964. Each petitioner was sentenced to three years in custody of the Attorney General. This judgment was not reported but appears in the printed Appendix, certified by the Clerk of the Court of Appeals as part of this record and transmitted herewith.

The opinion of the United States Court of Appeals for the Seventh Circuit, affirming said judgment, was filed on July 15, 1965. That opinion is not yet reported, but is set forth in the Appendix hereto, and in the certified copy of the record.

JURISDICTION

The order of the United States Court of Appeals for the Seventh Circuit, affirming the judgment of the United States District Court for the Northern District of Illinois, Eastern Division, was filed on July 15, 1965. On September 14, 1965, it was ordered that the petition for rehearing be denied. (These orders appear in the Appendix hereto.) This petition is filed within thirty days of the denial of the petition for rehearing in the United States Court of Appeals for the Seventh Circuit. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Where the trial judge and the Court of Appeals misunderstand and misconstrue the legal significance of facts, that is mortgage transactions in which adequate legal security was furnished a lender savings and loan company, and rely on the misconstruction to support a conviction on charges of fraud requiring proof beyond a

reasonable doubt of wilfulness, knowledge and specific intent, have not the defendants been deprived of due process?

2. Wilfulness, knowledge, and specific intent, necessary for conviction on the fraud charged, were only inferred from claimed circumstantial proof, and the circumstances themselves were not proved beyond a reasonable doubt, and thus have not the defendants been deprived of due process?

3. For "surrounding" or other circumstances to support inferences of guilt, must not the circumstances be established beyond a reasonable doubt?

STATUTES INVOLVED

Title 18, United States Code, Section 1006:

> "*Whoever, being an officer, agent or employee* of or connected in any capacity with the Reconstruction Finance Corporation, Federal Deposit Insurance Corporation, Home Owners' Loan Corporation, Farm Credit Corporation, Farmers' Home Corporation, the Secretary of Agriculture acting through the Farmers' Home Administration, or any land bank, intermediate credit bank, bank for cooperatives or any lending, mortgage, insurance, *credit or savings and loan corporation or association authorized or acting under the laws of the United States or any institution the accounts of which are insured by the Federal Savings and Loan Insurance Corporation,* or any small business investment company, with intent to defraud any such institution or any other company, body politic or corporate, or any individual, or to deceive any officer, auditor, examiner or agent of any such institution, or of department or agency of the United States, makes any false entry in any book, report or statement of or to any such institution, or without being duly authorized, draws any order or bill of exchange, makes

any acceptance, or issues, puts forth or assigns any note, debenture, bond or other obligation, or draft, bill of exchange, mortgage, judgment, or decree, *or, with intent to defraud* the United States or any agency thereof, or *any* corporation, institution, or *association* referred to in this section, *participates or shares in or receives directly or indirectly any money, profit, property, or benefits through any transaction, loan,* commission, contract, or any other act of any such corporation, institution, or association, shall be fined not more than $10,000 or imprisoned not more than five years, or both."

Title 18, United States Code, Sec. 657:

"*Whoever, being an officer, agent or employee* of or connected in any capacity with the Reconstruction Finance Corporation, Federal Deposit Insurance Corporation, Home Owners' Loan Corporation, Farm Credit Administration, Federal Housing Administration, Federal Crop Insurance Corporation, Farmers' Home Corporation, the Secretary of Agriculture acting through the Farmers' Home Administration, or any land bank, intermediate credit bank, bank for cooperatives or any lending, mortgage, insurance, *credit or savings and loan corporation or association authorized or acting under the laws of the United States or any institution the accounts of which are insured by the Federal Savings and Loan Insurance Corporation,* or any small business investment company, and whoever, being a receiver of any such institution, or agent or employee of the receiver, *embezzles, abstracts, purloins or willfully misapplies any moneys, funds, credits, securities or other things of value belonging to such institution,* or pledged or otherwise intrusted to its care, shall be fined not more than $5,000 or imprisoned not more than five years, or both; but if the amount or value embezzled, abstracted, purloined or misapplied does not exceed $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both."

Title 18, United States Code, Section 2:

"(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal."

STATEMENT OF THE CASE.

This is an appeal from a judgment of conviction by the Court [without a jury] as to the petitioners, Kenneth H. Katschke and Paul E. Pickle. As to both petitioners, the Court, on May 26, 1964, entered a finding of guilty as charged in Counts 1, 2 and 5 of the indictment and not guilty as charged in Counts 3 and 4 of the indictment. Counts 6 and 7 were dismissed by the Government. Counts 1 and 5 charged the petitioner Kenneth Katschke with violations of Title 18, United States Code, Section 657 which is the unlawful and willful misapplication of monies, funds and credits of a savings and loan association by an officer thereof. Count 2 charged Kenneth Katschke with a violation of Title 18, United States Code, Section 1006, which alleges the receipt of money, profits and benefits by an officer of a savings and loan association with intent to defraud. The petitioner, Paul E. Pickle, was charged with the same violations but under Section 2, Title 18, United States Code, in that he willfully, and with intent to defraud, aided and abetted the offenses committed by Kenneth H. Katschke.

The Court entered judgment on said findings on May 26, 1964; motions in arrest of judgment and for new trial were denied on June 30, 1964; each of the petitioners were committed to the custody of the Attorney General for a period of three years of each of Counts 1, 2 and 5 of the indictment; sentences on Counts 2 and 5 were to run concurrently with the sentence imposed on Count 1 and under Section 4208 (a)(2) Title 18, United States Code, with the petitioners to become eligible for parole at such time as the Board of Paroles may determine; and said sentences were imposed on June 30, 1964. Both petitioners are presently at large on bail in the amount of $5,000 each, pending appeal.

The errors complained of were: The Trial Court misconstrued the significance of certain facts and its special findings of facts were clearly erroneous; the Trial Court by said misconstruction of facts erroneously found the petitioners guilty; the elements of willfulness and specific intent to defraud are not supported by the evidence.

STATEMENT OF FACTS

The court, sitting without a jury upon request of the defendants below pursuant to Rule 23(c) of the Federal Rules of Criminal Procedure made special findings of fact. They are to be found in the Appendix (A. 175 to 181). Inasmuch as a portion of this appeal is directed toward the defendants' objections to the Court's finding of facts, the defendants below herein submitted a parallel statement of facts. Where appropriate, issue will be taken with the findings expressed by the Court.

A. D. K., a partnership engaged in the construction of homes, was composed of Roy Ardizzone, Richard H. DeRuiter and Stanley W. Kempa. A. D. K. caused eight lots to be put into a land trust with the Evergreen Bank in Chicago. Thereafter, the Evergreen Bank, as Land Trustee, issued notes secured by mortgages to the Central States Mortgage Company, the notes being individually guaranteed by the three members of the A. D. K. partnership. These notes and corresponding mortgages were for construction loans of $145,000 on each of the eight lots for eight 16-unit apartment buildings to be erected thereon. Each lot, when so improved, was valued at $190,000. There were appraisals in that amount available. (S. App. A. 6.)

Paul E. Pickle, one of the defendants, was the President and principal stockholder of Central States Mortgage Company (hereinafter called Central), whose principal business was acting as a mortgagee and a mortgage broker. Kenneth Katschke, the other defendant herein, was President, Director and majority shareholder of Tinley Park Savings and Loan Association (hereinafter called Tinley) whose accounts were insured by the Federal Savings and Loan Insurance Corporation. Katschke was not a member

of the loan committee and Tinley was actively managed by one Lyle Nelson, an attorney, employed by Tinley as House Counsel, Executive Officer, and chairman of the Loan Committee.

In April of 1961, Central needed funds to fulfill its commitments to A. D. K. respecting the erection of the first apartment building and borrowed $145,000 from Service Savings and Loan Association, (hereinafter known as "Service"), securing said loan with a mortgage and note. Also, Central secured commitments from Service for three further loans of $145,000 for the next three buildings. To facilitate these loans, Central recorded an assignment of three of its mortgages to Service by registration of said assignments of the mortgages in the Torrens recording system of Cook County. At the same time the promissory notes or security for said mortgages were stamped and identified by the Torrens office as the notes securing said mortgages. Central, however, then did not find it necessary to obtain said funds for the completion of said next three buildings. Thus, Service did not pay any consideration for the assignments of mortgages recorded to it and had no legally effective claim or lien upon these three lots, even though the assignment had been recorded in its favor by Central in the Torrens office.

In the month of March, prior to July 26, 1961, Katschke undertook, through his Katschke Land and Development Company, to purchase one-half interest of the majority stock of Chatham Bank of Chicago. Katschke was joined by one Quinn, who was securing the other half of the said majority interest of the Chatham Bank. No one else was involved. At the time, Katschke was also the holder of the majority of shares at Tinley Savings and Loan Association.

Katschke sought to acquire from Pickle $350,000 and gave Pickle a demand judgment note temporarily. (The defense tendered a Thermofax copy of this note to the witness Palumbo who stated she typed the original and recognized the type on the Thermofax as hers. (Supp. A. 19.) As the defense rested at the close of the Government's case, this copy was not offered in evidence.)

On July 26, 1961, after three apartments had been partially completed on the three lots (worth $190,000 each and $570,000 in the aggregate), Pickle, acting for Central went to Tinley to effect a short term or interim loan on the three improved lots in the aggregate amount of $353,500, including the $3,500 interest. As the buildings were in the process of going up, Central had every right to obtain such a loan. Why Central went to Tinley instead of obtaining the same funds from Service, which was already committed to Central to make the loans, is not apparent on the record. The defendants sought to show by the cross examination of an employee of Central, a Government witness, that Service had declined temporarily to carry out such said loans because its liquidity ratio (the ratio of Service cash to Service withdrawal), would not permit Service to complete such commitments. (Supp. A. 18, Tr. 161-4.) The trial court foreclosed this inquiry of the defendants which would have established that but for the purely accidental fact of the lack of loan liquidity of Service, Tinley would not have been involved at all in the making of the $350,000 loan on the three lots. Thus the very involvement of Tinley in the circumstances charged in the case at bar was but adventitious. Central went to Tinley instead of Service merely for an interim loan on the three improved lots until Service was able to make the loan, which Service later did do.

On July 26, 1961, Pickle obtained pertinent papers from Central's office filed on the three lots to make application for interim loans at Tinley on these three lots (Loan Nos. 568, 569 and 570). Pickle secured these papers from the office manager, Miss Geraldine Palumbo, the Government's witness. These papers were put together by Miss Palumbo in the ordinary course of business, nothing apart from routine and nothing unusual. Pickle took the papers to Tinley. In the process at Tinley, these papers first passed through the hands of Lyle Nelson, Attorney at Law, the loan officer, the managing officer and the vice-president of Tinley. The loan papers were given Tinley by Central (Pickle) with the three original notes of the Land Trustee (each guaranteed by A. D. K.) for each of the three lots. At this time each of these notes had been officially identified by the Torrens Office and bore the Torrens officially stamped identification number keyed to the identification number of the corresponding mortgages recorded at Torrens by Central. The fact that Tinley obtained from Central States such identified note as to each lot as its security for the aggregate loan of $350,000 on the three improved lots is of the utmost significance. (We shall point out in argument such fact is the basis of the Court's misconstruction and the ultimate finding of guilt.)

Nelson turned over to the loan clerk, Mrs. Nilsson, also a Government witness, the papers delivered to Tinley on behalf of the loan application of Central respecting the three lots. Nelson, the attorney, the loan officer, the Executive Vice President and managing officer of Tinley, instructed Mrs. Nilsson to issue a check for $350,000 payable to Central. Both Nelson, as well as Katschke, signed the disbursement check for $350,000.

In the course of her testimony, Mrs. Nilsson, in answer to the court's questions, stated that she had no part in the approval of loans and merely handled mechanical aspects of the loans (A. 41). Contrary to the findings of the court she was unskilled in legal judgment and opinion and did not testify she declared that security was lacking for the three loans in question.

After receipt of the check in the amount of $350,000 from Tinley which was drawn on the Bremen State Bank, the defendant, Pickle, went to the Midlothian State Bank which was closed on that particular day. Pickle spoke to Eugene J. Winston, the Executive Vice President and Cashier, and presented the check from Tinley to him and asked whether he could cash it. Winston said he could not because the check was payable to a corporation and further that he did not have that much cash on hand. Winston suggested that Pickle take the check to the Bremen State Bank on which it was drawn but Pickle told Winston that the bank was closed. Winston offered to issue a Midlothian cashier's check in the same amount because he knew Pickle was a man of substance and had done business with Midlothian on his personal account for many years prior to this date. Winston stated that the check would have to be made payable to Central States and Pickle agreed and Winston drew a Midlothian cashier's check payable to Central States in the amount of $350,000. The Tinley check for $350,000 was not deposited at Midlothian as Central had no account there. There is no evidence as to how the Tinley check was cashed or under what circumstances.

On the same day, Pickle endorsed the Midlothian cashier's check to Central as its President and turned the check over to Katschke who in turn endorsed it for deposit and deposited it in the account of Katschke Land Development

Co. at the Continental Illinois Bank. The Katschke Land Development Co. was an Illinois corporation owned by Katschke and his wife. On July 28, on instructions from Katschke, Continental charged the account of Katschke Land Development Co. in the amount of $343,060.00 which it had disbursed to one Walter J. Riley in payment for 1,009 shares of Chatham State Bank stock.

Later on, on or about August 14, 1961, Central, by applications approved and ratified by both the loan committee of Tinley and the Board of Directors of Tinley, who met during such period, obtained a $50,000 loan and a $28,493.44 loan on the original three properties covered by loan Nos. 568, 569 and 570. These two amounts formed the basis of Counts 3 and 4 on which the Court found the defendants not guilty. There was no evidence of the defendants' participation in these increases.

On or about August 29, 1961, Central again went to Tinley for an interim loan on Lots 10, 11, 25, and 26 which had been executed in June of 1961 by the Trustee and the notes guaranteed by the partners of A. D. K. about the same time as those on Lots 8, 9 and 27 involved in the July 26th transaction. Again, Pickle instructed Miss Palumbo to endorse Tinley the four notes secured by the mortgages simultaneously being signed to Service and to take the notes, application forms, and appraisals to Tinley but to send the mortgages and the assignments thereof to the Registrar of Titles for recording. This again was another interim loan with Tinley. Service, however, never picked up these loans and they remained with Tinley as valid and subsisting loans.

On or about August 31, 1961, three checks cleared simultaneously as follows: (1) a check from Tinley to Central regarding an additional loan effected by Central from Tinley of $440,000 for four additional construction loans, Nos.

625, 626, 627 and 628 regarding the remaining four lots owned by Evergreen Bank as Land Trustee for A. D. K. (2) At the same time a check from Central retired the three interim loans numbered 568, 569 and 570 by paying Tinley $350,000. (3) At the same time the check for Service for $287,000 was made to Central as the first payment on the three interim loans numbered 568, 569 and 570 which Service took over after Tinley had released the identified notes upon receipt of payment of $350,000 from Central. Thus, contrary to the Judge's findings, only $63,000 which constituted the difference between the repaid Tinley interim loan and the new Service loan could have been paid by the funds of the loan on the four lots which Central obtained at the amount of $440,000 from Tinley. There is no evidence that this was the fact as it does not take into account the cash flow in and out of Central to meet its obligations. While the evidence is not too clear from the record, it is respectfully submitted that Tinley kept these four loans on their books and were fully secured on the loan of $440,000. The interest on the first loan of $350,000 was in the amount of 6¾% plus $3500 in commission. The Trial Court predicated its finding of guilt on "risk of loss" rather than actual loss. (Supp. A. 30, 31.)

REASONS FOR GRANTING THE WRIT

1. This Court should exercise its supervisory jurisdiction to grant the writ of certiorari prayed for because the plain misconstruction of facts by the trial court and the Court of Appeals have resulted in a conviction based on a claimed fraud by obtaining and granting an unsecured loan, whereas there was factually and legally, adequate security, and no risk of loss to the lender, and thus the misconstruction of facts deprived the petitioners of due process of law and a fair trial in violation of the Sixth Amendment.

2. The decisions of the courts below presume nonexistent knowledge and intent to defraud, and the convictions are not based on substantial evidence, contrary to the decision of this Court in *Thompson* v. *City of Louisville,* 362 U.S. 199.

3. The convictions herein are founded on maladministration rather than fraud and are thus contrary to a decision of this Court, *U. S.* v. *Britton,* 107 U.S. 655 (1882).

I.

THE TRIAL COURT MISCONSTRUED THE SIGNIFICANCE OF CERTAIN FACTS AND AS A RESULT ITS SPECIAL FINDINGS OF FACT WERE CLEARLY ERRONEOUS.

The petitioners will take each finding under this heading of the brief and individually discuss the error committed by the Trial Court. The petitioners respectfully submit that the remedy to rectify a misconception regarding the significance of a particular fact such as a particular state of mind is to request special findings pursuant to the pro-

visions of Rule 23 of the Federal Rules of Criminal Procedure, 18 U. S. C. A. *Cesario* v. *United States,* 1 Cir., 200 F. 2d 232; *Wilson* v. *United States,* 250 F. 2d 312 (C. A. 9).

We submit that the three fact matters which the Court misconstrued directly involve the states of mind of the petitioners. It is upon these three erroneous findings of fact that they stand convicted. It is respectfully urged that if this Court should find that the Trial Court erred or even if the interpretation of these facts raises a reasonable doubt as to these petitioners' intent to defraud or willfully violate the statutes involved, this Court should reverse the conviction.

A.

Tinley Park Savings and Loan Association Was Fully Secured in Its Loans to Central States Mortgage Company.

Count 1 contains as a major indispensable ingredient of what it claims Kenneth Katschke did with intent to defraud, that Katschke fraudulently misapplied funds of Tinley in the amount of $350,000, purportedly representing proceeds of mortgage loans Nos. 568, 569 and 570, well knowing that Tinley received no instruments legally obligating anyone to repay Tinley in such amount, and, furthermore, well knowing that Tinley received no interest in any property to secure said mortgage loan. In other words, the indictment contains, as its major ingredient, the fact that Tinley received no security for its loan of $350,000. This is absolutely erroneous.

The IDENTIFIED NOTES given Tinley bore the identification number of the corresponding mortgages recorded from the Land Trustee to Central, as recorded in Torrens. (These Identified Notes in accordance with Torrens procedure did

not carry any further identification number.) When Tinley obtained the physical possession of each of said three Identified Notes, it, at the same time, obtained full security and protection for its three loans Nos. 568, 569 and 570, totaling $350,000. The explanation is simple. The Torrens office at no time would either transfer or release the lien of such mortgages against the three lots in question without the production of these three Identified Notes. Tinley, having possession of these three Identified Notes, would, therefore, always be assured of its repayment of its loan aggregating $350,000 before releasing possession of the Identified Notes. Moreover, Tinley's possession of the Identified Notes clearly gave it the dominant equity of lien in protection of its said loans over *all* others.

Miss Geraldine Palumbo, in speaking of the loans here made, testified as follows (Supp. A. 7-8):

> "In what we called interim financing, we had some cases where we would pledge at another bank. We would pledge temporarily and Central States would sign a note with the bank and then we would leave the documents with them. When we were ready to sell that mortgage to the savings and loan or insurance company or permanent investor, as we call it, we would pay off that note, pick up the document or replace it with a different set of documents and different files. We did have interim transactions in which we borrowed from a bank, while we were placing or selling the mortgage to some permanent purchaser. We had interim transactions on three occasions with Tinley. In any event, when we handled the processing of a loan, we went to the savings and loan association, gave them a letter, the note, the identifying appraisal and application of Torrens receipt, the affidavit and waiver. They would write out a receipt showing that Central States gave the documents to, for instance, Tinley. When we paid off the loan we would get them to acknowledge it,

and also we would go back to get the documents. If the borrower paid directly to either Service or Tinley, we never got the documents back. Only when there was an interim transaction did we get the documents back. In this particular case when we paid out the loan, we had them sign a receipt and we got the documents back. This was true of transaction numbered 568."

Apart from these recited facts noted above, however, is the further fact that under the law the identified notes which Tinley received certainly constituted an equitable mortgage. In its discussion of equitable mortgages it is stated in 59 C. J. S. at pages 43 and 44 as follows:

"Intention. The essential feature or essence of an equitable mortgage is the intent of the parties to create a mortgage, lien, or charge on property sufficiently described or identified to secure an obligation, which intent must be clearly established in order that such a mortgage may exist. If such intent exists, an equitable mortgage will arise. The intent is to be determined from a consideration of the whole transaction and not from any particular feature of it; it may be derived from the express language of the agreement or by necessary implication.

"Written instrument. The doctrine of equitable mortgages has been held not to be limited to written instruments intended as mortgages, but to extend to a variety of parol transactions. Where equity and good conscience so require, such a mortgage may be found, even though no writing exists.

"Persons against whom enforceable. Equitable mortgages are enforceable against the original contractor, his heirs, executors, administrators, and voluntary assigns, and against purchasers and encumbrancers with notice.

"§ 14. Transactions Constituting Equitable Mortgages.

* * * * *

"a. In General

"An equitable mortgage may be constituted by any writing from which the intention to create a lien on specific real estate as security for a debt is shown.

"An equitable mortgage may be constituted by any writing from which the intention to create such a lien may be gathered."

When Central gave Tinley the identified notes respecting loans Nos. 568, 569 and 570, which locked all further transfers or transactions in the Torrens Office on the properties to which said notes referred and were specifically identified with, it was the intention to create a lien and charge upon the property in the nature of an equitable mortgage. There can be no other reasonable intention. As a matter of fact, one of the footnotes, 9(1) on page 44 of the C. J. S. text, refers to an equitable mortgage established by a note pledging described realty as security for a debt evidenced thereby. The exact and fixed identification between the note and the mortgage certainly meets such qualification, and there is nothing in the record of this action that tends in the least to disturb the necessary implication of the intention that the identified note which so operated upon the mortgages as to lock them in status quo pending the repayment of the obligation due Tinley of $350,000 was not fairly an equitable mortgage and would not be so viewed by any court sitting in equity. In this connection, we cite the leading case of *Pollak* v. *Millsap*, 219 Ala. 273, 122 So. 16 and 65 A. L. R. 110 at 113, as follows:

"In the case of *Hall* v. *Mobile & M. R. Co.*, 58 Ala. 10, the court adopts the following language from Jones on Mortgages: 'There are so many kinds of equitable

> mortgages, as there are varieties of ways in which parties may contract for security, by pledging some interest in lands. Whatever the form of the contract may be, if it is intended thereby to create a security, it is an equitable mortgage'—unless it is a legal one. This language is quoted in *Woodruff* v. *Adair*, 131 Ala. 530, 545, 32 So. 519, with the additional statement that 'if the transaction resolve itself into a security, whatever . . . be its form, it is in equity a mortgage.' "

The giving of the Identified Notes in the transaction was intended to constitute and believed to constitute and, therefore, *did* constitute a form of security, and, therefore, an equitable mortgage.

We wish to emphasize also that apart from the element of intention, the transfer of the debt by the Identified Note operated as an assignment of the mortgage. The rule is that a transfer of a debt secured by a mortgage or other instrument in the nature of a mortgage carries with it the mortgage security, and operates as an equitable assignment thereof (59 C. J. S. Mortgages, Sec. 356, page 504). There can be no other conclusion than that Tinley was amply secured.

Moreover, we suggest to the court that the Government's investigative bodies thoroughly checked out all of what we say, both at the Torrens Office and with respect to Mr. Lyle Nelson, the attorney at law, the Vice President, the loan officer and the managing officer of Tinley, who was under Government subpoena to testify. It is suggested to the court that if Mr. Nelson had appeared on behalf of the Government case, the matter of the complete failure of the indictment as to both this Count 1, as well as Count 2 dependent thereon, would have been plainly visible to the court, and, indeed, by the actual testimony of the Government's own witness, who, as a lawyer doing his duty,

and, as any lawyer, as a matter of fact would have recommended to Tinley that the possession of such identified notes would have given it complete security for the loans it made on July 26, 1961 to Central.

> "If a bank were amply secured, such fact would, as a matter of logic, be inconsistent with an intent to defraud the bank, . . ." *Morrissey* v. *United States,* 67 F.2d 267 at 274 (1933).

But if there were any doubt on the security held by Tinley on the first three mortgages, how can the Government answer the fact that the second four mortgages, on which Tinley paid out $440,000 and which again like the first three were originally meant to be an interim mortgage, remained at Tinley as valid and subsisting loans. Service did not acquire these mortgages and they were retained by Tinley. There were on the adjacent lots and the apartment units were identical to those on the first three loans. Thus, if these four were good, how can anyone logically deny the security on the first three? There is no evidence to the contrary.

B.

There Was No Loss Nor Risk of Loss to Tinley Park Savings and Loan Association on Said Loans.

Another fatal deficiency in the Government's proof in the case at bar is the absolute and total failure of its proof to show a loss, even a temporary loss—even the reasonable probability of a loss.

The Government claims there is no need to show any loss, temporary or permanent, or even the probability of a loss. The court has held with the Government on this point. We disagree.

It has been held in case after case that the term "wilfully misapplies" as used in the statute, and Count I based thereon, means nothing in and of itself. It must be coupled with something done with intent to injure or defraud the bank. (*Mulloney* v. *U. S.* (1935), 79 F. 2d 566, 581.) To injure means, of course, to harm, hurt or damage, or, in other words, to cause a loss. Does "to defraud" mean anything different?

Turning to the civil wrong of fraud, we point out that no case has ever been sustained without proof of loss (37 C. J. S. 215, 216, 217). Is criminal law something different when not a private wrong but a public wrong is involved? The answer is no, except in criminal law that acts are reprehensible when they may be said to be an endeavor to cause a loss.

The process of evolving such intent to defraud in criminal cases is well illustrated by the following quotation from *U. S.* v. *Youtsey* (1894), 91 F. 864 at 870:

> "As to the second point in issue, which is the intent to defraud or injure the bank, necessary to establish the crime: It is not a crime for a cashier to discount bad paper, or accept for collateral worthless securities, unless the act is accompanied by an intent to defraud the bank. *That must appear affirmatively.* By way of inducement to show the intent, the indictment avers that Bryan was insolvent, and that the collateral was worthless, and that the defendant knew these facts. If you find that (1) Bryan and the others were insolvent, and that the (2) collateral to each of the notes was worthless, or worth much less than net face value of the note,—if you find that (3) the defendant knew that the Berry and ferry company and Youtsey notes were good, that Bryan and the others were insolvent, and that the collateral was worth much less than the notes it purported to secure, and that he did not be-

lieve either that Bryan and the others would pay the notes they had signed, or that the collateral was of value sufficient to pay the notes,—the presumption is that the *defendant intended the natural consequences* of his own act, and therefore intended to injure or defraud the bank, though this presumption is not conclusive; and it is for you to determine from the circumstances whether this presumption is maintained or rebutted; and, if you do not beyond a reasonable doubt think that the presumption is the right one, then it is your duty to acquit." (Emphasis added.)

Thus, even when the transaction is riddled with worthless collateral and insolvency, a defendant may still be innocent if acting in good faith. *But* to hold a defendant guilty of the intent to defraud, it is indispensable that the necessary predicate of worthless collateral and insolvency or Loss Or Probability Of Loss must be shown affirmatively.

Normally in this genus of criminal litigation, situations of no loss and of the absence of reasonable probability of loss are infrequent. Courts have, nevertheless, had occasion to treat on this question:

"To show misapplication of funds with intent to defraud it was necessary to show losses. The United States pitched its proof upon showing loss from individual transactions resulting in a final permanent loss. . . . While we agree that it was not an essential or necessary part of the case of the United States to show final permanent loss, nonetheless proof of such loss was permissible to show Matsinger's intent to effect wilful misapplication of funds with intent to defraud."

United States v. *Matsinger,* 191 F. 2d 1014 at 1017 and 1018 (1951).

" 'To be within the statute the transaction must therefore be obviously improper and unjustifiable when it was made, *and there must be such probability of loss*

as to warrant a finding beyond a reasonable doubt that there was an intent to injure or defraud the bank.' " (Emphasis added.)

Mulloney v. *United States,* 79 F. 2d 566 at 581 (1935).

"But as the bank holds the paper, which is in itself a credit against the Oklahoma Investment Company, and as it does not appear that the Oklahoma Investment Company was insolvent, and as no other reason appears why the paper is uncollectible, it must be assumed that upon presentation by the association to the Oklahoma Investment Company it will be paid. *If, so, then it does not appear that the bank loses anything by the transaction.* It is not materially different from the defendant's having received for the bank and discounted the note of the Oklahoma Investment Company, and taken the proceeds himself. In such case, unless it appeared that the investment company was insolvent, or that for some other reason the paper was uncollectible, the mere charge that it was done by the defendant to injure and defraud the bank would not be sufficient to make criminal a state of facts which fails to show on its face that injury or fraud would probably result. *United States* v. *Britton, supra,*" (Emphasis added.)

United States v. *Norton,* 188 F. 256 at 269 and 270 (1911).

" 'This clearly states the misapplication and actual conversion of the money by the methods described, that is to say, by paying it out of the funds of the bank to a designated person when that person was not entitled to take the funds, and that owing to the insolvency of such person *the money was lost to the bank.*' " (Emphasis added.)

Olmstead v. *United States,* 29 F. 2d 239 at 241 and 242 (1928).

> "It has been expressly ruled by the Court of Appeals of this circuit that to complete the misapplication of the funds of a bank it is necessary that the fund should be withdrawn from the possession or control of the bank, or a conversion thereof in some form should occur, *so that the bank loses the same. Dow et al.* v. *United States,* 82 Fed. 904, 27 C. C. A. 140, 49 U. S. App. 605; *Mohrenstecher et al.* v. *Westervelt,* 87 Fed. 157, 30 C. C. A. 584, 57 U. S. App. 618. This is so, for the obvious reason that, in respect of a check drawn on a bank, although the drawer may not at the time have any fund on deposit with which to pay it, non constat, he may have when the check is presented for payment; and in respect of the draft issued by the Emporia bank on the New York bank, the drawer might at any time before presentation and payment thereof withdraw it or stop payment." (Emphasis added.)
>
> *United States* v. *Martindale,* 146 F. 280 at 282 (1903).

The transactions in the cases from which the above quotations were derived took various forms. Yet, in all the element of loss or probability of loss is an all important element. Otherwise, there exists no dividing line between application *vs.* misapplication and between no fraud *vs.* fraud. The only and sole ground is loss or reasonable probability of loss so as to show intent to defraud (or intent to cause injury and loss).

As to Count II.

All of what we have said above under our discussion of Count I respecting loss or reasonable probability of loss as the crux of the existence of the intent to defraud applies with equal vigor to Count II.

Count II in the main respects criminal prosecution under a statute for making false entries. Herein this statute is believed to approximate the SEC statute alluded to by the

Court respecting a finding of guilty in another case regarding a prosecution for knowingly making a false statement in a prospectus about oil lands when, later, oil was found. Yes, if the case at bar could be said to contain a matter of false entry, false statement, hidden or concealed banking matters, or something fictitious there might be ground for conviction. But none of such matters appear. The very documentary exhibits of the Government show all activity to have been "on the table"—plain to everyone.

And no one of such "everyone," including bank examiners, state and federal, and, including the Tinley Loan Committee and Board of Directors who actually increased the loan limits of loans 568, 569 and 570, totally apart from Katschke's influence, ever found anything wrong in these open transactions, even a civil nature, let alone of a criminal aspect.

Finally, as to Count II, it is a disservice to good sense to deem that Katschke derived a legal benefit from the $350,000 given by Tinley to Central under the loans (568, 569 and 570) in question. Central did. Katschke did not. Katschke only derived his benefit of $350,000 from Central, not Tinley, and only by reason of his personal judgment demand note he gave Central for $353,500 as the preliminary step in the disposition of Katschke's valuable land in a transaction later concluded.

As to Count V.

Indeed, it was a matter of business judgment for Tinley to have loaned Central the aggregate sum of $440,000 ($110,000 on each of four lots and respecting loans 625, 626, 627 and 628).

Admittedly, as far as it is shown from Central's bank account at the Bremen Bank the sum of $63,000 from the proceeds of one of these loans (of $110,000) was used by

Central as a part of its repayment to Tinley of interim loans 568, 569 and 570. We say this because on August 31, 1961, Central transferred the interim loans 568, 569 and 570 from Tinley to Service and Central received at once from Service $287,000, which Central used to repay the $350,000 it owed Tinley. And, of course, shortly thereafter Service also paid Central an additional $85,000 on said three loans (568, 569 and 570) which it took over from Tinley.

But nowhere in the record is there any showing of Katschke's participation, involvement in or influence, either direct or indirect, on the making of these four loans aggregating $440,000.

There is no evidence to show that Katschke had anything to do with or any connection, direct or indirect (either by exercise of influence, by instructions or by exercise of direction and control, or any other participation) with loans 625, 626, 627 and 628. Accordingly, Katschke must be held not guilty under Count V. In support of this conclusion, we quote the following expression of *Prettyman* v. *U. S.* (1910), 180 F. 30 at pages 38 and 39:

> "The testimony clearly shows that Littich paid out the money but failed to show that Prettyman was in any wise connected with either of the checks so paid, or that he paid or directed the payment of either of them, or that he participated in either of the transactions. It equally fails to show that the application of any part of the money paid upon the checks was made by Prettyman himself or by his consent, direction, or knowledge. Having regard to the essential elements of the offense charged against Prettyman, it is entirely clear that, if there were any willful misapplication of any part of the money which went to the payment of any of the checks, it was not the act of Prettyman. To constitute the offense of willful misapplica-

tion of the funds of a national bank, there must in fact be an application of those funds by the person charged, the application must be an unlawful one and must have been made by the accused with the intent to injure and defraud the bank."

at page 43:

"In *Union Pacific Coal Co.* v. *United States,* 173 Fed., at page 740, 97 C. C. A., at page 581, the Circuit Court of Appeals of the Eighth Circuit, speaking through Judge Sanborn, said:

" 'There was a legal presumption that each of the defendants was innocent until he was proved to be guilty beyond a reasonable doubt. The burden was upon the government to make this proof, and evidence of facts that are as consistent with innocence as with guilt is not sufficient to sustain a conviction. Unless there is substantial evidence of facts which exclude every other hypothesis but that of guilt, it is the duty of the trial court to instruct the jury to return a verdict for the accused.' "

C.

The Amount of $350,000 Loaned by Central States Mortgage Company to Katschke Did Not Constitute Funds of Tinley Park Savings and Loan Association.

The instrument which Katschke received from Pickle on July 26, 1961, was a cashier's check in the amount of $350,000. A cashier's check is defined in 11 Am. Jur. 2d, paragraph 18 as a "bill of exchange drawn by a bank upon itself and accepted by the act of issuance." The same section defines a certified check as "a check upon which the drawee bank has assumed an obligation by as-

suring that the drawer has funds and that such funds have been set apart for the satisfaction of the check. It is an accepted bill of exchange. In some respects it is similar to a certificate of deposit."

There is a discussion of the issuance and nature of cashier's checks in 10 Am. Jur. 2d paragraph 544 (page 518). It reads as follows:

> "A cashier's check is a bill of exchange, drawn by the bank upon itself, and is accepted by the act of issuance. While the only apparent basic or factual difference between a cashier's check and the ordinary check is that the ordinary check is drawn on one other than the drawer, while in a cashier's check both the drawer and the drawee are the same, there are certain differences, some radical, in the incidents and consequences of the two types of checks. *A cashier's check is a primary obligation of the bank, rather than the depositor, as in the case of an ordinary check, and a promise to pay which ordinarily cannot be countermanded.* It is issued by the authorized officer of a bank, directed to another person, evidencing the fact that the payee is authorized to demand and receive from the bank, upon presentation, the amount of money represented by the check. Cashier's checks from their peculiar character and general use in the commercial world, are regarded substantially as the money which they represent, a rule that is not extended to ordinary checks of the depositor drawn on his bank." (Emphasis supplied.)

The question posed here is whether or not Katschke had a right to believe that because he received a cashier's check in the amount of $350,000 he had a right to assume that these were not any part of the funds disbursed by Tinley to Central on account of the three loans. This record is devoid of any showing by the Government as to what the financial condition of Pickle or Central States was or for that matter Katschke, on or about the time of the issuance of this cashier's check.

The Government's witness, Winston, who was the cashier of Midlothian, testified concerning the transaction with Pickle and out of the presence of Katschke. While his testimony is narrated in the record, the following colloquy is reproduced from the transcript, pages 282 through 287:

"A. No. To the best of my knowledge this was the first transaction in our bank pertaining to the Central States Mortgage itself.

By Mr. Young:

Q. Didn't they have an account there?

A. No. Mr. Pickle's business was on a personal basis with us.

Q. Then it was his personal account that was at the bank?

A. Yes, sir.

Q. I misunderstood. I am sorry, Mr. Winston. Well, actually it is true, is it not, that if I came in off the street to see you and presented you with a check of this sort, that you would require it to clear through deposit, would you not?

A. Correct.

Q. Therefore, some other ingredient was in this picture to give you the confidence to issue this check with propriety on the bank's part, wasn't it?

A. Yes, sir.

Q. Wasn't that a faith in Mr. Pickle's standing as of July 26, 1961, that he had, a man of substance, to meet this obligation?

A. Yes, sir.

Q. Isn't it also true that if someone outside the bank didn't hear your conversation and who knew about the check that Midlothian had received, that is the check that had been given you, and also knew about the check that was obtained, the cashier's check—am I clear?

A. Yes, sir.

Q. That that person outside the bank and not knowing about that when he saw the cashier's check would assume, or could readily assume that the cashier's check was issued for other funds of Mr. Pickle's in the bank and not the check that was brought into the bank by Mr. Pickle.

Mr. Atkins: Your Honor, I will object as to what other people would assume from looking at a cashier's check.

The Court: Particularly looking at a cashier's check made payable to Central States Mortgage. I can't imagine anyone assuming this came from Mr. Pickle's personal funds. Sustained.

I think anyhow, it is an improper question to ask what somebody else might assume. This is a guessing game. A cashier's check is a cashier's check.

By Mr. Young:

Q. Assuming from your knowledge of the regular banking procedures Mr. Winston,—assuming Mr. Winston, that a check as you testified, Government's Exhibit 10 was presented to the Midlothian State Bank and to you there on the same day, and the check hadn't gone through deposit or anything, you know, through the clearing procedures of bank deposits, and it is made out on another bank, it is a check of another bank, the Bremen State Bank and not your own, and assuming that you issued on this extra ingredient of trust and confidence in Mr. Pickle the cashier's check, your cashier's check back to who presented you that check, the first check, the Exhibit No. 10, and you gave back Government's Exhibit No. 49, your cashier's check, would it be a fair statement of banking practice that anyone looking at this check on July 26, 1961, that is a cashier's check issued by you, following the regular normal procedures of banking practice as you explained where cashier's checks have to have deposited funds before they are issued, have assumed that there were on hand in the Central States Mortgage Company deposit at Midlothian Bank $350,000?

Mr. Atkins: Your Honor, I will object. The question—and I don't know if it is a story or a question—is totally incomprehensible. It asks what somebody else would assume. I suggest the check speaks for itself.

Mr. Young: In response to that—

The Court: Sustained. Let me ask a question.

A bank cashier's check is ordinarily issued under what circumstances Mr. Winston?

The Witness: Ordinarily issued for cash.

The Court: In other words, ordinarily purchased.

The Witness: Yes.

The Court: Is it sometimes issued by a charge against a depositor's account?

The Witness: In rare cases, yes, it is.

The Court: In lieu of a certified check, in other words.

The Witness: Yes.

The Court: But the ordinary situation, the man just comes in and buys a cashier's check?

The Witness: That is right.

Mr. Young: No further questions." (Emphasis supplied.)

The funds represented by the cashier's check were the funds of Midlothian Bank and drawn upon its credit. Katschke, irrespective of the transaction between Pickle and Winston out of his presence, had a right to assume that upon his execution of the judgment note the proceeds of the loan which he received from Pickle were not funds of Tinley Park Savings and Loan. In no event in this transaction could either of the parties be said to have had an intent to defraud which is required by the statute.

II.

THE TRIAL COURT MISCONSTRUED THE SIGNIFICANCE OF CERTAIN FACTS AND ERRONEOUSLY FOUND THE DEFENDANTS GUILTY.

In the Supplemental Appendix (pp. 27-31) there is to be found colloquy between the Court and counsel of great significance.

The Court first states (Supp. A. 27) that the Government's position is that the ultimate violation of the statute resulted "when the proceeds from those perfectly valid documents—well perhaps not perfectly valid, since Service was made the mortgagee under them, and so forth but, at least that could have been used, I assume for an interim loan. But the proceeds from those documents were not turned over to the borrower. They were not turned over to A. D. K." Then he came out flatly and stated (Supp. A. 28) that these documents "were all in good order and so forth, because they were in good order, I have seen them, I have looked at them, * * *". The Trial Court at this point took the position that the offense was bottomed on the fact that A. D. K. did not immediately secure the money.

Counsel for the petitioners thereupon argued that despite the position of the Court that the money was not immediately turned over to A. D. K., it is indisputable that they got their money. The Court replied, "not in July or August". The short answer to that was that A. D. K. was not paid out because they had not reached the stage of completion which required the pay-out. Tinley left the matter of waivers and completion inspections in the hands of Central. (Supp. A. 17.) Central made the loan and was under no obligation to sequester the funds or to make immediate pay-out of such funds. If A. D. K. had a com-

plaint it was against Central. Tinley was secured. The transaction between Central (Pickle) and Katschke was a separate matter. The Court was, at this point, confused and stated (Supp. A. 29):

> "No, but my understanding is they were paid out of the—on the first three, out of the proceeds on the second four. I understand that. But at some point there was still an unpaid $350,000, or thereabouts, and all that happened was that the second four replaced the first three as the source of the three hundred fifty, but—no, I understand that they ultimately got their three hundred fifty. They didn't get it in July. I take it they got it the end of August, at the time the second four were put in and replaced with the first three, because the money had been spent. The money was spent according to the testimony of Mr. Galezio, the Continental man, in July when he issued a check for $343,500 in payment for Mr. Reilly's Chatham State Bank stock, and this is the problem I have with the fact sequence of this case."

It seems apparent that the ground having been cut from under the Court on its theory that the gist of the offense was to be found in the fact that A. D. K. was not immediately paid he turned to an alternate theory that the loans were not secured and there was a risk of loss. The Court shifted its position in this colloquy. (Supp. A. 31.)

> "No, I don't think you can say that, on this record, it is perfectly clear that Tinley Park Savings and Loan had 100 per cent secured loans, because of this record, from Mr. DeRuiter and the rest of the testimony, they had a defense. They didn't get the money, they didn't get the proceeds of the loan, and whatever they did in asserting that defense, I don't know, but that there was a risk of loss to Tinley Park Savings and Loan seems to me perfectly apparent from the evidence that I have heard. Whether there was an actual loss or not,

> I don't know, but all that the statute requires is there be a risk of loss. That's all that is necessary to make a crime under the federal statute, a risk of loss, not a loss, but a risk of loss."

Still later the Court stated (A. 163):

> "It has been argued to me that there can be no violation of the sections of the code involved unless there is in fact a loss. I want to make it clear that I do not believe that to be the law. I believe the law to be that there is a violation of these sections of the statute involved, if there is a risk of loss, and if, as in this instance, the risk of loss is a part of an overall scheme to divert funds to the personal uses of an officer and direction, in this case the controlling officer and director of each of these companies, Mr. Katschke of Tinley Park Savings and Loan, Mr. Pickle of Central States Mortgage."

Then later the Court says (A. 169):

> "Now, I may be wrong, Mr. Young, but I don't think I'm going to change my mind that that was a violation of the sections of the code with which these gentlemen were charged with being in violation, and I wonder if everybody wouldn't be better served if I just deny these motions and you proceed with whatever additional, because, you know, there is no point in my kidding you. * * * I told you then, my understanding of the statute was that there didn't have to be an actual loss, there has to be a risk of loss, and that there was a risk of loss in those transactions seems to me to be perfectly obvious. You cannot take $350,000 out of a savings and loan association on a mortgage which they don't have and not risk loss." (A. 171.)

It is quite obvious that the Court, in shifting its position from finding guilt in the fact that the proceeds of the loan were not immediately turned over to A. D. K., turned to the proposition that the loans involved a risk of loss. What is the basis upon which the Court found the risk of loss?

He stated that you cannot loan $350,000 without a risk of loss. Yet if this Court believes as we urge it should do, that the identified notes constituted a proper security for the loan there was in fact no unusual risk of loss. There was no risk of loss that would not be entailed in granting any mortgage. It is always possible that there will be a default, but if the security is adequate, there is no "real" risk of loss. We have heretofore argued *in extenso* that the security for the loans was not only valid but sufficient in terms of value. We submit that if the Court had correctly viewed the significance of the "identified notes", it could not logically come to the conclusion that there was a risk of loss.

The Trial Court summarily disposed of the efforts of the defendants to show that whatever transaction occurred between Pickle and Midlothian, Katschke was not a party to it. The Court assumed that the cashier's check drawn on Midlothian were funds of Tinley. The Court assumed that because of the coincidence of the amounts that these were the same funds. Defense counsel's efforts to impress this fact upon the Court was summarily rejected. We have heretofore argued that Katschke had every right to take the cashier's check at face value. Katschke had no interest in Central and could not know, nor was it demonstrated that he did know, what cash or negotiable assets Central had which could be used for the purchase of the cashier's check from Midlothian.

These three questions raised "reasonable doubt on the question of guilt. The Court had such a doubt and the record so indicates. (A. 163, 169, 170, 171, 173.) Cf. *James* v. *U. S.*, 366 U. S. 213.

III.

THE ELEMENTS OF WILLFULNESS AND SPECIFIC INTENT TO DEFRAUD ARE NOT SUPPORTED BY THE EVIDENCE.

Petitioners submit that mere evidence that the alleged acts were performed without proof of "culpable" intent, did not provide a sufficient foundation upon which the Court erroneously found these defendants guilty.

This Court has repeatedly held that the cases require a showing of the presence of "culpable" intent as a necessary element of intent. In *Morissette* v. *United States,* 342 U. S. 246 (1952), at pages 264-265, the Court stated:

> "Congress has been alert to what often is a decisive function of some mental element in crime. It has seen fit to prescribe that an evil state of mind, described variously in one or more such terms as 'intentional,' 'wilful,' 'knowing,' 'fraudulent' or 'malicious,' will make criminal an otherwise indifferent act, or increase the degree of the offense or its punishment. Also, it has at times required a specific intent or purpose which will require some specialized knowledge or design for some evil beyond the common law intent to do injury. The law under some circumstances recognizes good faith or blameless intent as a defense, partial defense, or as an element to be considered in mitigation of punishment. * * *"
>
> "It follows that the trial court may not withdraw or prejudge the issue by instruction that the law raises a presumption of intent from an act. It often is tempting to cast in terms of a 'presumption' a conclusion which a court thinks probable from given facts. The Supreme Court of Florida, for example, in a larceny case, from selected circumstances which are present in this case, has declared a presumption of exactly

opposite effect from the one announced by the trial court here: '* * * But where the taking is open and there is no subsequent attempt to conceal the property, and no denial, but an avowal, of the taking, a strong presumption arises that there was no felonious intent, which must be repelled by clear and convincing evidence before a conviction is authorized. * * *' *Kemp* v. *State*, 146 Fla. 101, 104, 200 So. 368, 369."

* * * * * *

"Moreover, the conclusion supplied by presumption in this instance was one of intent to steal the casings, and it was based on the mere fact that defendant took them. The court thought the only question was, 'Did he intend to take the property?' That the removal of them was a conscious and intentional act was admitted. But that isolated fact is not an adequate basis on which the jury should find the criminal intent to steal or knowingly convert, that is, *wrongfully* to deprive another of possession of property. Whether that intent existed, the jury must determine, not only from the act of taking, but from that together with defendant's testimony and all of the surrounding circumstances." *Morissette* v. *United States*, 342 U. S. 246; 72 S. Ct. 240.

Similarly, the Court has repeatedly stated that the word "willfully" connotes an "evil or bad" intent to do or omit the doing of something. In *Potter* v. *United States*, 155 U. S. 438 (1894) at page 446, the Court stated:

"Doing or omitting to do a thing knowingly and wilfully, implies not only a knowledge of the thing, but a determination with a bad intent to do it or to omit doing it. 'The word "wilfully,"' says Chief Justice Shaw, 'in the ordinary sense in which it is used in statutes, means not merely "voluntarily," but with a bad purpose.' 20 Pick. (Mass.) 220. 'It is frequently understood,' says Bishop, 'as signifying an evil intent without justifiable excuse.' Crim. Law, vol. 1, Sec. 428."

In *United States* v. *Murdock*, 290 U. S. 389 (1933), at pages 394-395, the Court stated:

> "The word [willfully] often denotes an act which is intentional, or knowing, or voluntary, as distinguished from accidental. But when used in a criminal statute it generally means an act done with a bad purpose (*Felton* v. *United States*, 96 U. S. 699; *Potter* v. *United States*, 155 U. S. 438; *Spurr* v. *United States*, 174 U. S. 728); without justifiable excuse (*Felton* v. *United States, supra; Williams* v. *People*, 26 Colo. 272; 57 Pac. 701; *People* v. *Jewell*, 138 Mich. 620; 101 N. W. 835; *St. Louis, I. M. & S. Ry. Co.* v. *Batesville & W. Tel. Co.*, 80 Ark. 499; 97 S. W. 660; *Clay* v. *State*, 52 Tex. Cr. 555; 107 S. W. 1129); stubbornly, obstinately, perversely, *Wales* v. *Miner*, 89 Ind. 118, 127; *Lynch* v. *Commonwealth*, 131 Va. 762; 109 S. E. 427; *Claus* v. *Chicago Gt. W. Ry. Co.*, 136 Iowa 7; 111 N. W. 15; *State* v. *Harwell*, 129 N. C. 550; 40 S. E. 48. The word is also employed to characterize a thing done without ground for believing it is lawful (*Roby* v. *Newton*, 121 Ga. 679; 49 S. E. 694), or conduct marked by careless disregard whether or not one has the right so to act, *United States* v. *Philadelphia & R. Ry. Co.*, 223 Fed. 207, 210; *State* v. *Savre*, 129 Iowa 122; 105 N. W. 387; *State* v. *Morgan*, 136 N.C. 628; 48 S. E. 670."

Cf. *James* v. *United States*, 336 U. S. 213, 221 (1961).

There was absolutely no evidence of any intent to defraud in this case. No *indicia* of fraud is to be found in the conduct of these transactions. Nothing was hidden and all transactions were completely open to scrutiny. There was absolutely no effort to cover up or in any way conceal what occurred. It is not sufficient to prove that Katschke and Pickle did these things. It is respectfully submitted that the fact that no denial of these transactions was made creates a strong presumption that there was no felonious intent or bad motive. Even third parties to these transac-

tions testified that it was not unusual for the documents to be handled in the manner in which they were. The Government has completely failed to prove the elements of willfulness and specific intent to defraud.

The petitioner, Pickle, urges upon this Court the proposition that if the defendant Katschke is not guilty of the offenses charged in the indictment, he cannot be guilty.

While a defendant may be tried and convicted as a principal on proof that he aided and abetted the commission of a crime, he cannot aid and abet in the commission of a crime unless there is another who has committed an offense. *U. S.* v. *Horton* (C. A. 7), 180 F. 2d 427.

In *United States* v. *Turnipseed,* 272 F. 2d 106 (C. A. 7, 1959), at page 107, the Court stated:

> "In order to aid and abet the commission of a crime it is necessary that the supposed aider and abettor act with knowledge that an offense is to be committed. * * *"

In *Edwards* v. *United States* (C. A. 5) 286 F. 2d 681, the Court stated:

> "As the court recognized, under this indictment charging Edwards with aiding and abetting Evans to commit the offenses, it was necessary to establish the guilt of Evans as well as that of the defendant Edwards.
>
> 'The basic principle of law is recognized that an aider and abettor may not be guilty in aiding or abetting a principal unless a principal did as a matter of fact commit a crime.' *United States* v. *Howitt,* D. C. S. C. Fla., 1944, 55 F. Supp. 372, 374, affirmed 5 Cir., 1945, 150 F. 2d 82, affirmed, 1946, 328 U. S. 189, 66 S. Ct. 923, 90 L. Ed. 1162.
>
> 'The law requires a guilty principal before the aider and abettor can be punished.' *Karrell* v. *United States,* 9 Cir., 1950, 181 F. 2d 981, 985."

Consequently if this Court should find that Katschke was convicted on a misconstruction of fact by the Trial Court, the conviction against Pickle cannot stand.

CONCLUSION.

Wherefore, it is prayed that this Court grant the Writ of Certiorari requested.

Respectfully submitted,

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APPENDIX A

In the

United States Court of Appeals

For the Seventh Circuit

No. 14815 SEPTEMBER TERM, 1965 APRIL SESSION, 1965

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
KENNETH H. KATSCHKE and
PAUL E. PICKLE,
Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

JULY 15, 1965

Before SCHNACKENBERG and KNOCH, *Circuit Judges,* and MERCER, *District Judge.*

SCHNACKENBERG, *Circuit Judge.* Kenneth H. Katschke and Paul E. Pickle, defendants, appeal from a judgment[1] of conviction by the district court, on a finding of guilty on counts 1, 2 and 5 of an indictment, charging violations

[1] We construe this appeal to be from two separate judgments rendered against defendants.

of 18 U.S.C.A. § 657[2] and § 1006,[3] Pickle being charged as an aider and abettor in violation of 18 U.S.C.A. §2.

As revealed by the findings of fact of the district court, specially made pursuant to 18 U.S.C.A. rule 23 (c), various persons and enterprises involved in this case are:

> Kenneth H. Katschke, president, director and large stockholder of Tinley Park Savings and Loan Association (Tinley);[4] director and stockholder of Gold Star Homes, Inc.
>
> Paul E. Pickle, president and principal stockholder in the following:
>
> > Central States Mortgage Company (Central States) whose principal business was acting as mortgagee and mortgage broker;
> >
> > Gold Star Homes, Inc. (Gold Star) a manufacturer of prefabricated housing units including apartments;
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> > C.M.O. Builders, building contractors;
> >
> > and other companies engaged in building and construction activities.

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[2] Whoever, being an officer * * * of * * * any * * * savings and loan * * * association * * * willfully misapplies any moneys, funds, credits, securities or other things of value belonging to such institution * * * shall be fined not more than $5,000 or imprisoned not more than five years, or both; * * *.

[3] Whoever, being an officer * * * of * * * any * * * savings and loan * * * association * * * with intent to defraud * * * participates or shares in or receives directly or indirectly any money, profit, property, or benefits through any transaction, loan, * * * of any such * * * association, shall be fined not more than $10,000 or imprisoned not more than five years, or both. * * *

[4] A Savings and Loan Association, the accounts of which were insured by the Federal Savings and Loan Insurance Corporation.

A.D.K. Enterprises (A.D.K.), a partnership composed of Roy Ardizzone, Richard H. DeRuiter and Stanley W. Kempa engaged in building and selling housing units, including prefabricated apartments purchased from Gold Star and erected on land held by the First National Bank of Evergreen Park, as Trustee under Trust No. 225, a land trust of which the partners of A.D.K. were the beneficiaries. (The bank is hereinafter called the "Trustee".)

Central States sold mortgage loans to Tinley. Katschke and Pickle were jointly interested in Lincolnway Homes, which was engaged in the building of new homes.

In findings 5-24, the district court found, as follows:

5. Under date of July 26, 1961, Pickle personally delivered to Tinley certain documents, including identified notes payable to Central States executed by the Trustee and guaranteed individually by the three partners of A. D. K., appraisals, applications, photostats of Torrens Receipts and Affidavits and Waivers with respect to lots 8, 9 and 27 of the lots held by the Trustee under Trust No. 225. In April, 1961, Central States had secured a commitment from Service Savings and Loan Association (hereinafter called "Service") to purchase first mortgage loans of $145,000 on each of these lots. Mortgages dated June 6, 1961, and assignments thereof to Service, dated July 6, 1961, and recorded with the Registrar of Titles of Cook County on July 7, 1961, although in the possession of Central States, were not delivered to Tinley on July 26.

6. On two occasions shortly before July 26, Pickle asked an employee of Tinley, one Rebecca Nilsson, whether the money was ready on the Evergreen Park loans and when advised that she knew nothing about them said he would speak to Katschke about the matter.

7. On July 26, Lyle E. Nelson, an officer and attorney for Tinley, turned over to Mrs. Nilsson the documents on the three lots delivered to Tinley by Pickle and instructed her to issue a check for $350,000, payable to Central States. After examining the documents Mrs. Nilsson went to Katschke's offiice where he, Pickle and Nelson were having coffee, and asked whether she could disburse funds in the absence of any evidence of title. Nelson referred her question to Katschke who told her to issue the check, which she did.

8. After receipt of the check which was drawn on the Bremen State Bank, Pickle went to the Midlothian State Bank (hereinafter called "Midlothian") which was closed because the day was Wednesday. Pickle saw Eugene J. Winston, Executive Vice President and Cashier, presented the $350,000 check from Tinley payable to Central States to him, and asked if he could cash it. Winston replied that he could not because the check was payable to a corporation and because he did not have that much cash on hand. Pickle explained that he needed immediate funds or credit. Winston suggested he take the check for certification to the Bremen State Bank on which it was drawn. Pickle demurred, saying that the Bremen bank was closed. Winston then offered to issue a Midlothian cashier's check in the same amount. Pickle asked if the cashier's check could be made payable to him personally. Winston informed him that it would have to be made payable to Central States, the payee of the original Tinley check. Pickle agreed and Winston drew a Midlothian cashier's check payable to Central States in the amount of $350,000.

9. Still on July 26, 1961, Pickle endorsed the Midlothian cashier's check on behalf of Central States as its President and turned the check over to Katschke who in turn endorsed it for deposit and deposited it in the account of Katschke Land Development Co. at

the Continental Illinois National Bank and Trust Company of Chicago (hereinafter called "Continental").

10. Katschke Land Development Co. was an Illinois corporation, all of the shares of which were owned by Katschke and his wife, both of whom were also directors and officers, Katschke being President and his wife being Secretary and Treasurer.

11. On July 28, 1961, pursuant to previous authorization and instructions from Katschke, the Continental charged the account of Katschke Land Development Co. in the amount of $343,060, which it had disbursed to one Walter J. Riley in payment for one thousand and nine (1,009) shares of Chatham State Bank common stock. This left a balance of $15,308.84 in the Katschke Land Development account at the Continental.

12. Katschke and Pickle knew that none of the proceeds of the $350,000 were turned over to the Trustee, A. D. K. or its partners, the ostensible borrowers from Tinley.

13. Under date of August 14, 1961, Tinley issued a check for fifty thousand dollars ($50,000) payable to Central States, and on August 22, a check for twenty-eight thousand four hundred ninety-three dollars and forty-four cents ($28,493.44), also payable to Central States. Both checks were charged to the same three loans as the previous $350,000, these loans having been given Tinley loan numbers 568, 569 and 570. The latter two checks were deposited in Central States' account at the Bremen State Bank.

14. On August 29, 1961, Pickle instructed an employee of Central States, one Geraldine Palumbo, to assemble or prepare appropriate notes, mortgages and assignments for four loans on lots 10, 11, 25 and 26 of the lots held by the Trustee under Trust No. 225.

15. Notes and mortgages to Central States on these four lots had been executed in June, 1961, by the Trustee and the notes guaranteed by the partners of A.D.K., all on or about the same time as those on lots 8, 9 and 27 involved in the July 26 transaction. On August 29, pursuant to Pickle's instructions, Miss Palumbo prepared assignments to Service of the four mortgages on lots 10, 11, 25 and 26, which were executed by Pickle on behalf of Central States on the same date and recorded with the Registrar of Titles of Cook County on September 5, 1961.

16. On the same date, August 29, Pickle instructed Miss Palumbo to endorse to Tinley the four notes secured by the mortgages simultaneously being assigned to Service and to take the notes, application forms and appraisals over to Tinley but to send the mortgages and the assignments thereof to the Registrar of Titles for recording. Pickle also instructed her to take a blank Central States check with her to Tinley.

17. Upon arrival at Tinley, Miss Palumbo presented the documents (except the notes which were not delivered until August 31, 1961) with respect to lots 10, 11, 25 and 26 to Mrs. Nilsson, received a check for $440,000 payable to Central States and filled in the blank check to Tinley for $435,244.68, the then outstanding balance of the three earlier loans on lots 8, 9 and 27. She then received back the notes, appraisals and application forms, relating to such loans, which had been previously deposited with Tinley on July 26, 1961. She then returned to Central States' office, with the documents. The $440,000 check was subsequently deposited in Central States' account at the Bremen State Bank on August 11, 1961.

18. Still on August 29, 1961, the documents in question together with mortgages, mortgage assignments, insurance policies, affidavits, waivers of liens and other related documents were delivered to Service to effect

the three $145,000 construction loans on lots 8, 9 and 27, which Service had committed in April 1961, to purchase.

19. On August 29, 1961, no construction had started on the four lots numbered 10, 11, 25 and 26. Construction did not begin on such lots until some time in September and was not 60% completed on any of the lots until November or December, 1961.

20. Commencing in December, 1961, the partners of A. D. K. made inquiries of Pickle as to why they were not receiving the 60% of the four loans on lots 10, 11, 25 and 26, since construction was more than 60% completed. In mid-December, Ardizzone and DeRuiter had a conference with Pickle at his office on the subject at which time he told them to see Katschke at Tinley Park who would explain the program which had been worked out for them. On the same day, Ardizzone and DeRuiter saw Katschke who advised them that conditions at Tinley Park were such that the 60% of the loans could not be paid at that time but assured them he would work out arrangements for them to receive 40% currently if they would bring in the necessary waivers of liens.

21. Although they brought in the waivers, the money was not forthcoming and Ardizzone and DeRuiter continued to press for payment. Ardizzone and Katschke had a conference in January at which Katschke commented that he had three attorneys and was one step ahead of persons he was dealing with. In mid-February Katschke, Ardizzone, DeRuiter and one Lawrence Kahn, an employee of the Chatham State Bank, went to lunch together. Ardizzone stated that A. D. K. was in desperate straits financially and needed money right away. Katschke then explained his program for the acquisition of a controlling interest in the Chatham State Bank, acknowledged that the 60% of the four loans had been used for this purpose, and added that he had been successful and their

"financial heartaches" were over. He also observed that his wife had packed his bags and if the Chatham Bank deal did not go through he was ready to leave the country. Finally, he advised them to return to the Chatham Bank the following Monday at which time they would receive a loan of at least $25,000.

22. On Monday, February 19, 1961, a loan in the amount of $25,000 was granted to Ardizzone, DeRuiter and Kempa on their individual signatures. When Ardizzone subsequently objected to the transaction, asking how the partners were going to repay the note or pay the interest, Katschke told him not to worry, that it would all be taken care of and that he, Katschke, would pay the interest.

23. On several occasions, Pickle told employees of one or another of his companies that he was participating in the acquisition of the Chatham State Bank with Katschke. In urging the salesman of Gold Star Homes, Norman Whitehouse, who dealt with A. D. K., to get more loans from the partnership, Pickle told Whitehouse he could raise about $325,000 on the A. D. K. loans which could be used to purchase the Chatham Bank.

24. Katschke, with Pickle's assistance, diverted $350,000 of Tinley Park's funds to his wholly owned company, Katschke Land Development Company, and used them to purchase 1,009 Chatham State Bank common shares. Although ostensibly the proceeds of three real estate mortgage loans, the funds were disbursed by Tinley Park on Katschke's instructions without the requisite mortgages and other security documents being obtained. Subsequently in August 1961, four similar loans without mortgages, etc., were made by Tinley Park on Katschke's instructions with Pickle's assistance, the proceeds of which were used to retire the earlier three loans and thereby to extend the period during which Katschke personally had the use of the $350,000 obtained from the first three ostensible loans.

Defendants in this court contend that these findings of the district court are clearly erroneous. We reject this contention. They are amply sustained by the evidence.

We hold that defendant Katschke, aided and abetted by defendant Pickle, unlawfully and willfully misapplied the funds of Tinley and converted them to his own use. We further hold that said defendants, with intent to defraud Tinley, did unlawfully and willfully participate, share in and receive money, profits and benefits, which Katschke obtained in funds disbursed by Tinley to Central States in connection with purported mortgage loans which he caused to be granted by Tinley. All of the actions of both defendants during the various steps of the foregoing transactions support the conclusions which we reach. We find no error committed by the district court as charged by defendants.

For these reasons, the judgments from which this appeal was taken are affirmed.

Judgments Affirmed.

A true Copy:
Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX B

In the

United States Court of Appeals

For the Seventh Circuit

Chicago 10, Illinois

Tuesday, September 14, 1965

Before

HON. ELMER J. SCHNACKENBERG, *Circuit Judge*
HON. WIN G. KNOCH, *Circuit Judge*
HON. FREDERICK O. MERCER, *District Judge*

UNITED STATES OF AMERICA
No. 14815 vs.
KENNETH H. KATSCHKE

It is hereby ordered by the court that the petition for a rehearing of this cause be, and the same is hereby denied.

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 667

KENNETH H. KATSCHKE AND PAUL C. PICKLE,
PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-9a) is reported at 350 F. 2d 587.

JURISDICTION

The judgment of the court of appeals was entered on July 15, 1965. A petition for rehearing was denied on September 14, 1965. The petition for a writ of certiorari was filed on October 14, 1965. The jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the evidence was sufficient to support petitioners' convictions.

793-184—65

STATEMENT

Petitioner Katschke was convicted in the United States District Court for the Northern District of Illinois of willful misapplication of the funds of a federally insured savings and loan institution by an officer thereof, and of receipt of said funds with intent to defraud in violation of 18 U.S.C. 657 and 18 U.S.C. 1006, respectively. Petitioner Pickle was convicted of aiding and abetting Katschke in commission of these offenses. (App. 4, 5, 8–9).[1] Both petitioners were sentenced to three years imprisonment on each of three counts, the sentences to run concurrently (App. 195–197). The court of appeals affirmed both convictions.

Petitioner Katschke was the president and major stockholder in Tinley Park Savings and Loan Association ("Tinley") (App. 39), and petitioner Pickle was the president and principal stockholder in Central States Mortgage Company ("Central"). Central was in the business of brokering construction mortgages and had sold loans to Service Savings and Loan Association ("Service") and to Tinley on many occasions (S. App. 2). In June 1961, Service made a commitment with Central to take mortgages for three parcels of land owned by ADK Enterprises, a client of Central (S. App. 2). The mortgages and an assignment to Service were recorded in Cook County under Pickle's instructions (S. App. 3).

[1] "App." refers to petitioners' appendix filed in the court of appeals and "S. App." refers to the supplement thereto.

On July 26, 1961, Pickle instructed the secretary of Central to prepare these same three loan files for placement with Tinley. When she pointed out to him that the assignments had already been made to Service, Pickle said this would be all right since they would be at Tinley only temporarily until he bought them back (S. App. 3).

On July 26, 1961, an employee of Tinley was instructed by Katschke in Pickle's presence to draw a check to Central for $350,000 (App. 38–39). When the employee pointed out that the loan files revealed no evidence of title, Katschke told her to prepare to check anyway since he knew Pickle to be reliable (App. 39).

Later that day Pickle attempted to cash the $350,000 check at the Midlothian Bank, where he had his personal account. Midlothian's vice-president stated that he could not cash it since he did not have that much cash, and because the check was made out to the corporation (App. 35–36). Pickle told the bank that he needed to get immediate clearance at his corporate bank since Central had checks outstanding. The Midlothian Bank then exchanged Tinley's check for a Midlothian cashier's check (App. 35–36).[2] On the same day, the cashier's check was endorsed and deposited in the special service account of Katschke Land Development Company at another bank (App. 44–45). Two days later the purchase of $343,000

[2] Tinley's $350,000 check was drawn on the Bremen State Bank (App. 36), where Central also had a checking account. Thus, merely depositing the check in that bank would have given Central almost immediate credit.